

NOVA SCOTIA COURT OF APPEAL

Cite as: R. v. Moniz, 1993 NSCA 184

Matthews, Chipman and Pugsley, J.J.A.

BETWEEN:

RICARDO MONIZ

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Stanley MacDonald
for the Appellant

Dana W. Giovannetti
for the Respondent

Appeal Heard:
September 15, 1993

Judgment Delivered:
September 15, 1993

THE COURT: Leave to appeal granted, but the appeal is dismissed per oral reasons for judgment of Matthews, J.A.; Chipman and Pugsley, JJ.A. concurring.

The reasons for judgment of the court were delivered orally by:

MATTHEWS, J.A.:

The principal issue in this appeal is whether the trial judge applied the proper test

to the testimony given at trial and secondly whether his verdict was unreasonable or cannot be supported by the evidence.

After hearing testimony of witnesses called on behalf of the Crown and defence and argument of counsel for the most of two days, the trial judge, in a short oral decision, found the appellant guilty of break and entry of a dwelling house and theft therefrom. Section 348(1)(b) of the **Code**.

The appellant complains that the trial judge when faced with conflicting testimony, did not enunciate the test properly in that he considered the "question" to be decided was one of credibility between two witnesses, one who categorically stated that the appellant together with that witness and one other person committed the crime and the other witness who offered alibi evidence on behalf of the appellant together with some alleged statements implicating another person.

As this and other courts have said on innumerable occasions, the test is not whether one or the other witnesses is credible, but whether on the whole of the evidence there is a reasonable doubt as to an accused's guilt, that is, whether the Crown has proven the guilt of the accused beyond a reasonable doubt.

The trial judge began his short oral decision, by setting out in his second paragraph:

"The onus is on the Crown always to prove its case beyond a reasonable doubt. If there is any reasonable doubt whatsoever in my mind, it has to be resolved in favour of the accused."

It was only after so stating that the trial judge dealt with the conflicting evidence of those two witnesses. He reviewed some, but not all of the other evidence. He categorically accepted the evidence of the witness who implicated the appellant and equally emphatically rejected that of the opposing witness. If one were to accept the condemning witness, in the light of all the evidence which the trial judge heard, then the inescapable conclusion is, as the trial judge said in his final paragraph, "In my view the Crown has

proven its case beyond a reasonable doubt".

While the trial judge did not set out the test in clear, unambiguous language, his was not a charge to a jury when a more precise charge would be required. He is an experienced trial judge. He recognized that on the whole of the evidence, "If there is any reasonable doubt whatsoever in my mind, it has to be resolved in favour of the accused". His reasons do not demonstrate that he failed to consider all of the evidence.

In addition, and in particular, in respect to the alibi, it is of interest that the appellant did not testify, although three witnesses were called on his behalf.

It is our opinion after examining, weighing and considering the effect of all of the evidence, the verdict is one that a properly instructed jury acting judicially could reasonably have rendered. In reaching that conclusion we have shown deference to the findings of credibility made by the trial judge.

We permit leave to appeal, but dismiss the appeal.

J.A.

Concurred in:

Chipman, J.A.

Pugsley, J.A.

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- and -
FOR

BY:
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REASONS

JUDGMENT

MATTHEWS,
j.a.